



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

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Mr. Scott A. Kelly  
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OR2003-2064

Dear Mr. Kelly:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178331.

The Texas A&M University System (the "system") received a request for "the contracts and proposals for electric energy service per your RFP request dated November 8, 2002." You state that the system is providing the requestor with a copy of the only contract that was awarded and that the remaining responsive information may contain proprietary information. You indicate, and provide documentation showing, that the system has notified AEP Retail Energy ("AEP"), Reliant Energy Solutions ("Reliant"), Sempra Energy Solutions ("Sempra"), and TXU Energy ("TXU") of the request for information in order to afford each entity an opportunity to supply objections to release of the submitted information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). We have reviewed the submitted information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, AEP and Reliant have not submitted to this office their reasons explaining why their information should not be released. Therefore, AEP and Reliant have provided us with no basis to conclude that they have a protected proprietary interest in any of the submitted information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or

evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Consequently, the system may not withhold the requested information pertaining to AEP or Reliant under section 552.110.

Sempra has submitted arguments in which it claims that Sempra's pricing proposal (pages 8 - 11) is excepted from disclosure under sections 552.104 and 552.110 of the Government Code.<sup>1</sup> Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." However, this exception protects the interests of governmental bodies, not the proprietary interests of a private party such as Sempra that has submitted information to a governmental body. See Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Furthermore, section 552.104 is a discretionary exception to disclosure that a governmental body may waive. In this instance, the system has not raised section 552.104. Therefore, none of the information that relates to Sempra may be withheld from disclosure under section 552.104.

TXU has submitted arguments in which it claims that TXU's pricing information (pages 10 - 12) is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 32.101 of the Utilities Code.<sup>2</sup> Section 32.101 provides:

(a) An electric utility shall file with each regulatory authority a tariff showing each rate that is:

(1) subject to the regulatory authority's original or appellate jurisdiction; and

(2) in effect for a utility service, product, or commodity offered by the utility.

(b) The electric utility shall file as a part of the tariff required under Subsection (a) each rule that relates to or affects:

(1) a rate of the utility; or

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<sup>1</sup>We note that Sempra also submitted arguments with regard to the executed contract between Sempra and the system. However, as the system is providing the requestor with a copy of the executed contract, with the exception of e-mail addresses, we only address Sempra's arguments with regard to the pricing proposal.

<sup>2</sup>We note that TXU also submitted arguments with regard to its Base Contract, Transaction Confirmations, and related Price Sheets. However, as the documents submitted by the system did not include this information, we only address TXU's argument with regard to its pricing information.

(2) a utility service, product, or commodity furnished by the electric utility.

(c) The commission shall consider customer names and addresses, prices, individual customer contracts, and expected load and usage data as highly sensitive trade secrets. That information is not subject to disclosure under Chapter 552, Government Code.

Clearly, this provision applies to tariff filings of an electric utility, and not the pricing information submitted in response to RFP's. Further, although this statute refers to customer information as "highly sensitive trade secrets," it does not state that the information is confidential. In order to withhold information under section 32.101, a governmental body must establish that the information is a trade secret under the definition set forth in the Restatement of Torts. *Cf.* Open Records Decision No. 652 (1997) (governmental body must establish that information is a trade secret as defined by the Restatement of Torts in order to withhold information under section 382.041 of the Health & Safety Code, which prohibits disclosure of information relating to secret processes or methods of manufacture or production). Therefore, we do not believe that section 32.101 of the Utilities Code is applicable in this instance and none of the submitted information may be withheld under this section.

Sempra and TXU also assert that their pricing information qualifies for protection under section 552.110(a) and 552.110(b) of the Government Code. Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a)-(b). The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business ... in that it is not simply information as to a single or ephemeral event in the conduct of the business .... A trade secret is a process or device for continuous use in the operation of the business .... [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other

concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Restatement of Torts § 757 cmt. b (1939) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the “trade secrets” component of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid under that component if that person establishes a prima facie case for the exception and no one submits an argument that rebuts the claim as a matter of law.<sup>3</sup> *See Open Records Decision No. 552 at 5* (1990).

Section 552.110(b) of the Government Code excepts from disclosure “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See also Open Records Decision No. 661 at 5-6* (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

As a general rule, after a contract has been awarded, pricing information is not excepted from disclosure under section 552.110. *See Open Records Decision Nos. 509 at 5* (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 (1982) (stating that pricing proposals are entitled to protection only during bid submission process). Furthermore, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See Gov’t Code § 552.022(a)(3)* (contracts with governmental body expressly made public); *see also Open Records Decision No. 541 at 8* (1990) (public has interest in knowing terms of contract with

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<sup>3</sup>The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company’s] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts, § 757 cmt. b (1939); *see also Open Records Decision Nos. 319 at 2* (1982), 306 at 2 (1982), 255 at 2 (1980).

state agency); *see generally* Freedom of Information Act Guide & Privacy Act Overview 213-221 (2000) (disclosure of prices is cost of doing business with government); *cf.* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors).

Because the public has a strong interest in the release of prices in government contracts, any pricing terms incorporated into Semptra's contract with the system cannot be excepted from disclosure under section 552.110. *See* Open Records Decision Nos. 514 (1988) (questioning whether general terms of contract with state agency could ever constitute trade secret), 494 (1988) (application of commercial or financial information prong of section 552.110 requires balancing of public interest in disclosure with competitive injury to company in question); *see generally* Freedom of Information Act Guide & Privacy Act Overview 213-221 (2000) (disclosure of prices is cost of doing business with government). However, we note that the pricing information Semptra seeks to withhold is not incorporated into the government contract with the system. Upon review of the submitted information and Semptra's and TXU's arguments, we find that Semptra has established the applicability of section 552.110(a) to its pricing information and TXU has established the applicability of section 552.110(a) to portions of its pricing information. Further, no arguments have been submitted that rebut Semptra's or TXU's claims as a matter of law. Accordingly, the system must withhold the information we have marked in Semptra's proposal and in TXU's proposal under section 552.110(a). In addition, we find that TXU has not shown that its remaining pricing information is confidential commercial or financial information. Thus, the system may not withhold any of TXU's remaining pricing information under section 552.110(b).

We note, and the system acknowledges, that the submitted proposals contain e-mail addresses obtained from the public. Section 552.137 makes certain e-mail addresses confidential. Section 552.137 provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The system must, therefore, withhold the e-mail addresses of members of the public that it has marked under section 552.137. We note that section 552.137 does not apply to a business' general e-mail address or to a government employee's work e-mail address.

Finally, we note that a portion of the submitted materials is copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

To summarize: (1) the system must withhold the e-mail addresses it has marked in the submitted proposals under section 552.137; (2) the system must withhold the portions of TXU's and Semptra's pricing information that we have marked under section 552.110(a); (3) the remaining requested information must be released; and (4) while the system must allow inspection of copyrighted information not otherwise excepted from disclosure, the system need not furnish copies of such information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

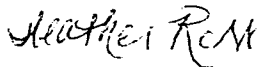
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Open Records Division

HPR/sdk

Ref: ID# 178331

Enc: Submitted documents

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